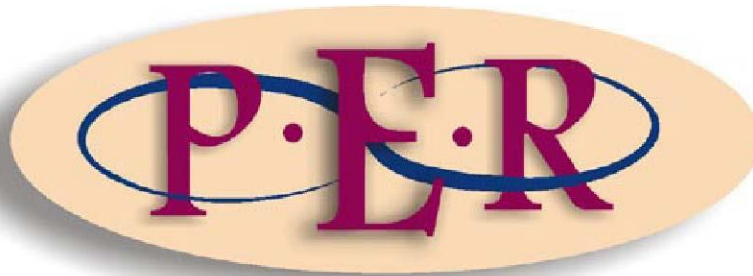


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P Kruger*

1 Introduction

As this is a nation riddled with a history of inequality, the *Constitution of the Republic of South Africa* is a sign-post to what one hopes is an end destination of inclusivity. Post-1994 the new democratic government faced the challenge of reversing the entrenched marginalisation not only of non-white citizens but also of persons with disabilities. The Apartheid government had tailored society, especially the education system, to abled-bodied persons. Accommodative and inclusionary policies were weak and reserved only for children belonging to the privileged minority. The new Bill of Rights clearly decries the continuance of this "ablism"-bias – Section 9 prohibits discrimination based on disability (an expressly listed ground) and section 26 offers an unqualified guarantee of the right to basic education.

In response to the abled-disabled dichotomy, the South African Cabinet adopted the Integrated National Disability Strategy in 1997 (INDS).¹ The INDS set out to change attitudes and destroy the social barriers hampering the enjoyment of a full life by persons with disabilities, and to take a person-centred approach in addressing issues peculiar to persons with disabilities and the inclusion of such person in all spheres of life.² The INDS marks a paradigm shift by framing disability as a social and not a mere medical issue.³ It views disability as a socio-political construct where the physical

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¹ Bhaiba 2009 *SAJHR* 222.

² Bhaiba 2009 *SAJHR* 222.

³ Office of the Deputy State President 1997 <http://www.gov.za/documents/download.php?f=187660>.

environment and social attitude of people are hostile and cause exclusion.⁴ It does not support the bio-medical perception of normalcy that centres on the person as a patient, discarding social factors and focusing on cure and rehabilitation.

Education White Paper 6: Special Needs Education (White Paper 6) is the policy mechanism within the education system to advance the social model. White Paper 6 attempts to create a learning environment that is universally inclusive and removes the barriers certain students may face during schooling. This thinking proved to be in line with international standards and was supported by the *Convention on the Rights of Persons with Disabilities*, which became effective in 2008. Article 24 of the Convention obliges states to "ensure an inclusive education system at all levels" and calls for the reasonable accommodation of an individual's needs to support full inclusion in the mainstream system of education.

White Paper 6 - which represents South Africa's domestic response to inclusive education - was central to the decision in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.⁵ The Western Cape High Court considered the question of the exclusion of profound and severely disabled students from the formal education system and found a violation of the right to basic education, human dignity and equality.

The purpose of this essay is to critically appraise the submissions by the parties in the *Western Cape Forum* case, as well as the judgment by the High Court. To achieve this purpose, the author will consider the issues emanating from the facts in the case, and will draw from foreign law and practice on the issue of inclusive education.

2 Issues arising from the *Western Cape Forum* case

2.1 *Educability of profoundly and severely intellectually disabled learners*

⁴ Leonard Cheshire Disability and Inclusive Development Centre 2007 http://www.ucl.ac.uk/lc-ccr/centrepublishations/workingpapers/WP03_Development_Critique.pdf.

⁵ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) (*Western Cape Forum*).

The government submitted that students with profound and severe mental disability would find no value in learning.⁶ This submission is reminiscent of past notions of the inherent incompetence of such students where the student was placed in custodial care only for supervision purposes.⁷ In an environment where the student received no exposure to learning, it is of little surprise that the student subsequently showed poor development, reinforcing the initial fallacy of inherent incompetence.⁸ This fallacy has not been universally dispelled – some contemporary commentators still question the entitlements of severely disabled persons to certain rights.⁹ The *Convention on the Rights of Persons with Disabilities* (CRPD) rejects this approach.¹⁰ The preamble of the Convention highlights everybody's entitlement to all the rights and freedoms in the *Universal Declaration of Human Rights* and the International Covenants, without distinction of any kind. The CRPD is a response to the systematic exclusion and dehumanisation of persons with disabilities by creating a framework where inclusion is a necessary result of the right to human dignity that vests in all persons.¹¹

The *Constitution of the Republic of South Africa* frames human dignity as both a stand-alone right (section 10) as well as a foundational value underscoring the interpretation of other rights.¹² The right to human dignity entails an enjoyment of all rights as an individual and encompasses the right to equality, as this enjoyment should be equally available to all, despite any personal differentiating factors.¹³ These rights include the right to education, a denial of which amounts to a violation of the right of an individual with profound or severe disability to human dignity. Therefore, even if the State could prove the ineducability of certain students with disabilities – an argument that the Court rejected with reference to the O'Donoghue case, which refused to limit

⁶ *Western Cape Forum* para 17.

⁷ Downing and Macfarland 2010 <http://cirrie.buffalo.edu/encyclopedia/en/article/114>.

⁸ Downing and Macfarland 2010 <http://cirrie.buffalo.edu/encyclopedia/en/article/114>.

⁹ Most notable is Princeton Professor, Peter Singer, who uses utilitarian philosophy to advocate for the infanticide of disabled children; Hymers 1992 *Ethical Perspectives* 131.

¹⁰ Preamble of the *Convention on the Rights of Persons with Disabilities* (2006).

¹¹ Nguyen "Rethinking the Politics of Inclusion/Exclusion" 2.

¹² *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 100.

¹³ Boezaart 2012 *SAJPL* 459.

education to scholastic learning only¹⁴ – the right to education is not dependent on its corresponding value to the person.

¹⁴ *O'Donoghue v The Minister for Health, The Minister for Education, Ireland and the Attorney General* 1993 2 IR 20 (IEHC).

2.2 Provision of educative services by non-government actors

The court correctly did not entertain the provision of services by non-governmental organisations as a proper fulfilment of the right to education.¹⁵ The idea of persons with disabilities being catered for by NGO's and faith-based institutions traces back to the charitable mode of thinking where any benefit given to persons with disabilities was an altruistic, additional element.¹⁶ The CRPD calls for a human rights approach where the state is the duty-bearer. This duty entails that the state assume the responsibility to take positive measures to ensure not only the availability but also the accessibility of education to all persons, including children who suffer from disabilities.¹⁷ Inclusion International, an organisation which addresses the right to education of persons with disabilities, sets out success indicators for the realisation of article 24 of the CRPD.¹⁸ The success indicators highlight the "explicit commitment [by the State] to the necessary policies, resources, training and facilities" and detail practical steps as to how States can achieve this.¹⁹

The granting of subsidies by the state to the Western Cape Forum for Intellectual Disability fails to fulfil the state's constitutional mandate to provide the relevant socio-economic rights, for two main reasons: the funding emanated from the Department of Health and accrued only to NGOs willing to care for the children. This illustrates that the funding is not conceptualised by the state as a fulfilment of its duty to provide education.²⁰ Secondly, the subsidies were disproportionate to the subsidies allocated to mainstream school pupils, despite the fact that students with profound and severe

¹⁵ *Western Cape Forum* para 24.

¹⁶ Murungi 2011 *ESR Review* 10.

¹⁷ Murungi 2011 *ESR Review* 10.

¹⁸ Inclusion International 2010 <http://inclusion-international.org/wp-content/uploads/2013/08/ImplicationsCRPD-dr2-X.pdf>.

¹⁹ These indicators include the repeal of any legislation which defines persons with disabilities as "ineducable"; making school buildings and learning materials accessible to all persons; the provision of accessible transport for persons with disabilities; and the provision of education that adheres to a "universal design", which includes adapting the curriculum and instructional/teaching models.

²⁰ Ngwenya and Pretorius 2012 *SAJHR* 102.

intellectual disabilities require a much higher resource allocation to sufficiently meet their needs.²¹ Ngwena and Pretorius²² comment that:

[n]eglecting the educational interests of the neediest would not have been allowed to enter the policy-formulation process if a notion of substantive equality-informed reasonableness [...] had dictated the state's understanding of its obligations [to provide basic education].

2.3 *Progressive realisation to education*

The government alleged that its duty to provide education should not be seen in isolation from its duty to provide other socio-economic services and that the duty should therefore be considered less onerous.²³ The court rejected this submission by considering the reasonableness of the shortfall in resource allocation. It was found that the state failed in this submission because the right to basic education was not qualified and was immediately realisable.²⁴ The right to education becomes progressively realisable only if the education demanded is of a tertiary nature.²⁵ The case dealt with the issue of basic education and therefore any assertion by the government agency as to the competing nature of the right to education with other socio-economic rights should have been discarded from the onset. This position is clear both in the South African *Constitution* and, in the commentary of the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee). Section 29 of the South African *Constitution* states that "[e]veryone has the right [...] to a basic education" and "the state, through reasonable measures, must make progressively available and accessible" the right to *further education* only.²⁶ The *Constitution* expressly indicates instances where progressive realisation is applicable.²⁷ The ESCR Committee also states that basic education should enjoy a preference in resource allocation over other socio-economic services.²⁸

²¹ Ngwena and Pretorius 2012 *SAJHR* 103.

²² Ngwena and Pretorius 2012 *SAJHR* 103.

²³ *Western Cape Forum* para 17.

²⁴ Boezaart 2012 *SAPL* 456.

²⁵ Murungi 2011 *ESR Review* 11.

²⁶ S 29(b) of the *Constitution*; own emphasis added.

²⁷ See also the right to housing, water and social security.

²⁸ *General Comment 13: The Right to Education* CESCR, UN Doc E/C.12/1999/10 (1999) para 51.

Even if one were to consider the right to education to be realisable in a measure similar to other socio-economic rights, the realisation of socio-economic rights generally should be viewed in the light of the right to equality and the interdependent relationship between it and the right to education.²⁹ This calls for a substantive rather than a formal approach to equality. Measures to bring about formal equality have failed so far to make any impact on the social disadvantages entrenched in our society.³⁰ Formal equality holds the characteristics of the dominant or empowered group as the baseline and measures equal treatment in terms of conformity to this norm.³¹ To illustrate this principle within a disability context, one can look to a simple example such as a wheelchair user trying to board a public bus with no accommodative device. The wheelchair user technically has an equal opportunity to approach and enter the bus, but due to a physical impediment in his environment (the steps, the narrow width of the door, the unavailability of floor space inside the bus, etc), the wheelchair user is unable to use the public transport and is thus, disadvantaged.

The new constitutional dispensation post-1994 called for substantive equality rather than formal equality. Where substantive equality is to be considered, redistribution is vitally important.³² A key role the court can play in trying to support the overlap in the right to equality and socio-economic rights is to call upon government to set out a thorough justification of why disadvantaged groups are burdened or excluded in distributive decisions.³³ This would serve both to increase the accountability of government and to ensure more involvement of vulnerable groups in the deliberative process.³⁴ The court in *Western Cape Forum* pertinently addressed the lack of justification given by government for the exclusion of profoundly and severely disabled persons. The fact that the children in question were from a particularly vulnerable group should be considered in the light of transformative constitutionalism, and any realisation of socio-economic rights should focus on such children so as to give true meaning to the right of equality.

²⁹ Ngwena and Pretorius 2012 *SAJHR* 106.

³⁰ Fredman 2005 *SAJHR* 166.

³¹ Fredman 2005 *SAJHR* 166.

³² Fredman 2005 *SAJHR* 163.

³³ Fredman 2005 *SAJHR* 164.

³⁴ Fredman 2005 *SAJHR* 164.

3 Rethinking special schools radically

As Ngwena³⁵ aptly observes, White Paper 6, upon full implementation, still creates an air of "separate but equal" education. While some students may be included in mainstream schools, students determined to require more support will still be educated in separate facilities. He draws parallels between "disabilism" and apartheid in so far as certain physical traits of a person determine their place within the societal hierarchy.³⁶ Apartheid segregated people along racial lines. Disablism performs the same function on the basis of physical abilities. The education system is partial to students with certain physical and intellectual abilities and so prescribes the curriculum, certain physical infrastructure and modes of assessment.³⁷ The social model of thinking about disabilities critiques this structural bias and calls for a complete transformation of the education system that would not require a classification of learners according to their abilities but would have a different constitution so as to accommodate all students and not unduly privilege one group over another.³⁸

The likeness between disablism and racial segregation can be noted once more through the lens of transformation theory, which presents itself as a potential method for redress. Transformation theory was developed by critical race and feminist theorists in response to institutional racism and sexism.³⁹ It requires the adoption of a proactive approach in order to fundamentally alter the structure of society so as to be able to eradicate injustice.⁴⁰ The vehicle for this transformation is substantive equality.⁴¹ In such a model the education system would be sufficient only if it were characterised by universal and equal accessibility. In such an egalitarian society there would be no need for segregated special schools, as mainstream schools would have been appropriately adapted.

³⁵ Ngwena and Pretorius 2012 *SAJHR* 106.

³⁶ Ngwena and Pretorius 2012 *SAJHR* 109.

³⁷ Ngwena and Pretorius 2012 *SAJHR* 108.

³⁸ Ngwena and Pretorius 2012 *SAJHR* 108.

³⁹ Bhaiba 2009 *SAJHR* 237.

⁴⁰ Bhaiba 2009 *SAJHR* 237.

⁴¹ Bhaiba 2009 *SAJHR* 237.

4 Comparative approach to inclusive education

In 2012, the European Commission commissioned a comparative study of the anti-discrimination and equality laws in South Africa, Canada, the United States and India.⁴² These four jurisdictions share English as a common language, have a common law heritage, have an equality clause in their constitutions, and specific equality legislation.⁴³ They also share the recognition of the need for affirmative action and the shift from formal to substantive equality.⁴⁴ These states have many other commonalities: each requires the domestication of international law before such law is binding (to varying extents), each is a party to many of the same human rights treaties (eg. the ICCPR) and recognises many of the same grounds for discrimination in their constitutions – with South Africa having the most exhaustive list.⁴⁵

While these states are by no means identical in their equality jurisprudence, the approaches of Canada and India with regards to inclusive education will be explored below. This will help shed light on the parameters and possibilities of inclusive education through the lens of a well-resourced and developed country, as well as a developing and deeply unequal state. Both these states have a history of entrenched marginalisation of the first nation people in Canada, and of members of the lower castes in India. For brevity's sake, the United States will be omitted from this comparative study.

4.1 Canada

Canada is a useful state with which we may compare ourselves usefully in the contexts of rights, as both South Africa and Canada use a dignity-centred equality test.⁴⁶ The drafters of the 1996 South African *Constitution* drew on the *Canadian Charter of Rights and Freedoms* (1982)⁴⁷ and the Constitutional Court frequently visits Canadian law in matters concerning equality.⁴⁸

⁴² European Commission *Comparative Study*.

⁴³ European Commission *Comparative Study* 5.

⁴⁴ European Commission *Comparative Study* 5-6.

⁴⁵ European Commission *Comparative Study* 5-6.

⁴⁶ Foster 2008 *Dal J Leg Studies* 73.

⁴⁷ Sarkin 1998 *U Pa J Const L* 181.

⁴⁸ Eg *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); *S v Zuma* 1995 2 SA 642 (CC) etc.

Section 15(1) of the Canadian Charter protects persons with mental or physical disabilities against discrimination. In *Eldridge v British Columbia (Attorney General)* the Canadian Supreme Court interpreted article 15(1) and held that the promotion of equality can sometimes call for the adoption of positive measures to give effect to equality of opportunity.⁴⁹ Failure to adopt reasonable accommodative steps can lead to unfair discrimination. On the issue of inclusive education, the Supreme Court determined that schools should exhaust all alternatives to segregation before removing children from mainstream schools.⁵⁰ This creates a wide reading of the state's duties in terms of non-discrimination against students with disabilities.

The most significant example of this progressive approach to inclusive education is that of Newfoundland. It is the Canadian province with the highest expenditure on inclusive education.⁵¹ The province shares its curriculum with other Atlantic Provinces and has a focus on inclusion where assistive devices, additional personnel and individualised educational plans are mandated.⁵² The system – often referred to as the cascade model – blends inclusive practices with additional services to persons with disabilities.⁵³ As extensive and well-resourced as the system might be, segregated special schools are still commonly used in instances where this practice is deemed to be in the best interest of the child.⁵⁴

4.2 India

India has also richly influenced post-1994 South African law. The draft proposal of the African National Congress in 1990 for the new constitution of South Africa drew heavily from Indian social justice jurisprudence.⁵⁵ The constitutional drafters also looked to India when making socio-economic rights justiciable, rather than settling for socio-

⁴⁹ *Eldridge v British Columbia (Attorney General)* 1997 151 DLR 577 (SCC) para 78.

⁵⁰ Philpott 2001 *The Morning Watch* 3 in interpreting the findings in *Eaton v Brant County Board of Education* 1997 1 SCR 241 (SCC).

⁵¹ As above.

⁵² Philpott 2002 http://www.ijdc.ca/VOL01_03_CAN/articles/philpott.shtml.

⁵³ Philpott 2002 http://www.ijdc.ca/VOL01_03_CAN/articles/philpott.shtml.

⁵⁴ Philpott 2002 http://www.ijdc.ca/VOL01_03_CAN/articles/philpott.shtml.

⁵⁵ Sripathi 2007 *Tul J Int'l & Comp L* 112.

economic directive principles.⁵⁶ Thus, the Constitutional Court of South Africa frequently considers the Indian approach in socio-economic cases.⁵⁷

What makes India particularly apt for study in an exercise in comparative constitutionalism is that India also shares with South Africa a massive income gap between its different classes, and an insufficiency of government resources to provide adequately provide socio-economic services. In addition, just as in South Africa, the response to the disability movement was slow – cultural ideas that linked disability to destiny and societal unresponsiveness to the needs of persons with disability led to a high rate of denial of access to education to children with disabilities.⁵⁸

India's policy seems very progressive in terms on providing for inclusive education. A joint reading of the *Persons with Disabilities Act*, 1995 and the *Right of Children for Free and Compulsory Education Act* 2009 creates a duty on the state to provide free education to children with disabilities until the age of 18.⁵⁹ Government policy⁶⁰ provides that this duty should be fulfilled in the spirit of integration into mainstream schools.⁶¹ However, like the approach taken by the South African government in the Western Cape case, the Indian government's practice has been to advance segregation through the funding of volunteer organisations.⁶²

In an effort to meet its obligations, despite severe resource shortcomings, the Indian government created the National Institute for Open Schooling (NIOS). The NIOS is an initiative that helps children with differing intellectual and physical capacities to follow a tailored and modified curriculum which allows them to progress at their own pace.⁶³ It was originally created to bring education to children in remote and rural areas, but

⁵⁶ Sripathi 2007 *Tul J Int'l & Comp L* 113.

⁵⁷ Sripathi 2007 *Tul J Int'l & Comp L* 113.

⁵⁸ Asia Research Centre 2010 http://www.lse.ac.uk/asiaResearchCentre/_files/ARCWP34DasKattumuri.pdf.

⁵⁹ Asia Research Centre 2010 http://www.lse.ac.uk/asiaResearchCentre/_files/ARCWP34DasKattumuri.pdf 11.

⁶⁰ National Policy for Persons with Disability, 2006 (Ministry of Social Justice and Empowerment 2006 http://www.svayam.com/pdf/English-national_disability_policy.pdf).

⁶¹ Asia Research Centre 2010 http://www.lse.ac.uk/asiaResearchCentre/_files/ARCWP34DasKattumuri.pdf 11.

⁶² Asia Research Centre 2010 http://www.lse.ac.uk/asiaResearchCentre/_files/ARCWP34DasKattumuri.pdf 11.

⁶³ Andrade 2008 *Ind J Psychiatry* 227.

its application has been noted in a disability context.⁶⁴ It uses a model of distance learning.⁶⁵ This is naturally not ideal, as the learner with a disability is still not included in a mainstream school. However, it is important to note that the schooling is not segregated but decentralised.

A second initiative is the Care Giver Training under the *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act* (NT Act).⁶⁶ This system provides for either the provision of a care-giver or at-home training to families of persons covered under the NT Act.⁶⁷ The NIOS and Care Giver Training are frequently co-employed to aid students with disabilities.⁶⁸

4.3 Relevance of the Canadian and Indian experience

The approaches of both countries illustrate the need to take positive steps to include persons with disabilities in mainstream schools to give effect to substantive equality. However, the extent of the steps taken differs. In a more resource-rich and egalitarian context, extensive additional services and devices are available in-house to students as inclusionary tools. In India, the need to accommodate learners with disabilities is primarily met by a parallel schooling system that decentralises, but individualises, the educational experience. Two important similarities are present: both approaches allege an added advantage not only to the learner with a disability, but to all students. Decentralised schooling in India benefits abled-bodied persons who cannot travel to schools or find it too costly. In Canada, the presence of additional personnel and assistive devices makes learning easier overall. Secondly, both states retain special schooling for instances where accommodation of the student in a mainstream school would be unfeasible due to financial constraints or considerations of the student's best interest.

⁶⁴ Andrade 2008 *Ind J Psychiatry* 227.

⁶⁵ Andrade 2008 *Ind J Psychiatry* 227.

⁶⁶ *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act* 44 of 1999.

⁶⁷ Chapter 4 of the NT Act.

⁶⁸ Andrade 2008 *Ind J Psychiatry* 227.

Both of these states have incorporated radical changes or alternatives to the traditional schooling system to implement inclusive education and accommodate a large segment of students with disabilities into mainstream schools. South Africa can borrow from the Canadian Newfoundland model by reallocating financial resources it would have invested in additional special schools into support services and teacher training at mainstream schools. When it come to accommodating students with disabilities so severe that it becomes unfeasible to accommodate them in mainstream schools, Indian law (not necessarily practice) shows the usefulness of non-traditional forms of schooling. For such students, however, the government cannot escape the duty of investing more resources in their education. The *Constitution* mandates the inclusion of such students in the education system, regardless of the costs.

5 Conclusion

As this is an aspirational egalitarian society, the South African government is obliged to pay more than lip-service to the needs of persons who do not meet the mainstream criteria for physical ability. Ideally, South African society should be restructured and resocialised so that its benefits are more universally accessible to all its members. This would truly promote human dignity. However, financial constraints and a lack of political will have made true universality a pie in the sky dream. States world-wide continue to segregate and marginalise persons with disabilities in all spheres, including education.

This reality is being challenged (albeit within limits) by a growing understanding of substantive equality. It is no longer acceptable for governments to remain passive and cite myths and shallow justifications to avoid its duty to promote the human rights of all its citizens. The *Western Cape Forum* case signals the start of a process of holding the state to account. The judgment leaves room for improvement on advancing the rights of students with disabilities, but it does unequivocally challenge the South African government on its apathy towards the need to protect the right to education of children with profound and severe intellectual disabilities.

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LIST OF ABBREVIATIONS

ESCR Committee	United Nations Committee on Economic, Social and Cultural Rights
CRPD	Convention on the Rights of Persons with Disabilities
Dal J Leg Studies	Dalhousie Journal of Legal Studies
ESR Review	Economic and Social Rights Review

IJDCR	International Journal of Disability, Community and Rehabilitation
Indian J Psychiatry	Indian Journal of Psychiatry
INDS	Integrated National Disability Strategy
NIOS	National Institute for Open Schooling
NT Act	National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 44 of 1999
SAJHR	South African Journal on Human Rights
SAPL	South African Journal of Public Law
Tul J Int'l & Comp L	Tulane Journal of International and Comparative Law
U Pa J Const L	University of Pennsylvania Journal of Constitutional Law